Supreme Court, U.S.
FILED

NO. 011432 JAN 23 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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34 pp

TABLE OF CONTENTS

- Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by A Person in Federal Custody dated April 20, 1997 1-7

- Report of Magistrate Judge entered on December 18, 1998 8-19

- Omnibus Order entered February 25, 1999 20-22

- Supplemental Report of Magistrate Judge entered on June 21, 2000 23-28

- Order Affirming Magistrate's Supplemental Report and Recommendation entered on September 29, 2000 29-30

- Order Denying Movant's Motion for Leave to File Motion for Reconsideration of Order Adopting Report and Recommendation of Magistrate Judge Denying Motion to Vacate under 28 U.S.C. § 2255 entered on November 3, 2000 31

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 28th day of March, 2002, to: ***Susan Ponzoli, Assistant United States Attorney,*** Appellate Division, 99 Northeast Fourth Street, Miami, Florida 33132, and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Name of Movant	Prisoner No.	Case No.
RAMON LOPEZ	42004-004	91-317-CR-UUB

Place of Confinement
U.S.P. Atlanta, Georgia 30315

UNITED STATE OF AMERICA v. RAMON LOPEZ

Case No. 97-1422-CIV-UNGARGO-BENAGES
MAGISTRATE JUDGE SORRENTINO

MOTION

1. Name and location of court which entered the judgment of conviction under attack: United States District Court, for the Southern District of Florida, Miami Division.
2. Date of judgment of conviction: October 29, 1993.
3. Length of sentence: Life plus six (6) months.
4. Nature of offense involved (all counts): Counts 1: Conspiracy to Possess with Intent to Distribute Cocaine, 21 U.S.C. §846; a Class A Felony. Count 2: Possession with Intent to Distribute Cocaine, 21 U.S.C. §841(a)(1) a Class A Felony.
5. What was your plea? (Check one)
   (a) Not guilty. ☒
   (b) Guilty. ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: Not applicable.

6. If you plead not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐
7. Did you testify at trial?
   Yes ☐ No ☒
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐
9. If you did appeal, answer the following:
   (a) Name of court: U.S. Court of Appeals for the Eleventh Circuit.
   (b) Result: Affirmed the conviction.
   (c) Date of result: Aril 24, 1995.
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petition applications or motions with respect to this judgment in federal court?
    Yes ☒ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court: U.S. District Court, Miami Division.
    (2) Nature of proceeding: Motion for disclosure of the Grand Jury testimony and Concurrence Form.
    (3) Grounds raised: U.S. Customs had not jurisdiction to realized overseas operation (drugs) without special permit from the Department of Justice, nor from the Colombian Government in April 5, 1991. The evidency was unconstitutionally obtained, the government should not present it to the grand jury.
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☒
    (5) Result: This motion is pending response since Sept. 20, 1996.
    (6) Date of result:

(b) As to any second petition, application or motion, give the same information:
   (1) Name of court: Not applicable.
   (2) Nature of proceeding: Not applicable.
   (3) Grounds raised: Not applicable.
   (4) Did you receive an evidentiary hearing on your petition, application or motion? Not applicable.
   (5) Result: Not applicable.
   (6) Date of result: Not applicable.

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any application or motion?
   (1) First petition, etc. Not applicable.
   (2) Second petition, etc. Not applicable.

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: Not applicable.

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a)

through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: District Court abuse its discretion when it admitted evidence of prior conviction and spurns notice of appeal, when name and nature or prior conviction raise risk of verdict.

Supporting FACTS (state *briefly* without citing cases or law): It was abuse of discretion to admit prior conviction records after two government' witness testify that defendant was previously involved in a separate cocaine case, and mentioned also by defendant's counsel in cross-examination to establish discrimilarity (sic). The evidence could have been satisfy by stipulation. There is no impediment to Court, after objection to denied notice of appeal by alleging confusion, misleading, irrelevant or not to this jury.

B. Ground two: Conviction was obtained by prosecution misconduct in violation of Brady doctrine.

Supporting FACTS (state *briefly* without citing cases or law): A) When produces erroneous information on Jenks Material; B) denied that informant indeed start the sting operation under the direction of government agent in response to defendant's motion to dismiss on claims of pre-targeted, vindictive & selective prosecution; C) when consciously allowed the main and only witness committed perjury in cross-examination and testimony.

C. Ground three: Conviction obtained by use of evidency (sic) gained unconstitutionally and in violation of treaties of United States after committing a crime.

Supporting FACTS (state *briefly* without citing cases or law): The U.S. Customs had not authority, jurisdiction, nor the special permit to realize an overseas operation from the Department of Justice, neither the Government of Colombia. Committing the crime of trespassing when flew in to Colombia territory in violation of FAA regulation; to flight into a foreign country without permit and International Rules of International Civil Aviation Organization (ICAO); using a civil aircraft for the purpose and with a false identification number.

D. Ground four: Denial of effective assistance of counsel at preliminary hearing - trial and sentence.

Supporting FACTS (state *briefly* without citing cases or law): 1) Failed to investigate and challenge the charges brought against defendant at pre-trial and trial stages, after the evidency (sic) shows clearly that should be different charges; 2) Failed to appeal the denial of pre-trial motion to dismiss for

government misconduct; 3) Failed to object that prior drug conviction is not final for purpose of enhanced at sentence, while that conviction is subject to direct appeal.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: B) Issues couldn't had been appeal since depend in part on evidency (sic) not in the records for direct appeal; C) It was obtained in part through the FOI/PA Request; D) Movant did not raise this issues on appeal because he was deprived of his constitutional right of the effective assistance of counsel at preliminary hearing, trial and sentence.
14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
    Yes ☐ No ☒
15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing: Scott Miller, 620 North Mastha Dr., Key Biscayne , FL 3314; Tom Dawson, 2300 South Fourth Street, Leavenworth, Kansas 66048.
    (b) At arraignment and plea:
    (c) At trial: Robert A. Rosenblatt, 66 West Flagler St., Miami, Fl 33130 (Penthouse Suite).
    (d) At sentencing: William M. Norris, Suite 1305, 1390 South Dixie Highway, Coral Gables, Fl 33146.
    (e) On appeal: Arthur J. Berger, Suite 506, 9200 South Dadeland Blvd., Miami, Fl 33156.
    (f) In any post-conviction proceeding:
    (g) On appeal from any adverse ruling in a post conviction proceeding:
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☒ No ☐

Wherefore, movant prays, that the Court grant him all relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 20, 1997.

(date)

Ramon Lopez

Signature of Movant

Movant wish to express that he has not the transcript or other documents related to this case at this time and the information in basis to his recollection and belief.

R.L. (Initials)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)
MAGISTRATE JUDGE SORRENTINO

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPORT OF MAGISTRATE JUDGE

I. Introduction

Ramon Lopez, a federal prisoner confined at the Federal Detention Center at Miami, Florida, filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentences for conspiracy to possess with intent to distribute cocaine and possession of cocaine with intent to distribute following conviction after a jury trial in Case No. 91-0317-Cr-Ungaro-Benages.

Lopez is no longer proceeding pro se. He is now represented by Rhonda A. Anderson, Esquire. (DE# 344).

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

For its consideration of this motion (DE# 318), the Court has the response of the government to an order to show cause with multiple exhibits (DE# 339), the movant's reply to the government's response (DE# 350), and the government's supplemental response in opposition to the movant's motion

for leave to invoke discovery, etc. (DE# 351).

II. Issues

Lopez raises the following claims:

1. The court abused its discretion when it admitted evidence of prior convictions and spurned his notice of appeal of a prior conviction.
2. His conviction was obtained by prosecutorial misconduct in violation of the Brady[1] doctrine.
3. His conviction was obtained by use of evidence gained unconstitutionally and in violation of FAA regulations.
4. Ineffective assistance of counsel who failed to:
   a. Investigate and challenge his charges at the pretrial and trial stage.
   b. Appeal the denial of pretrial motions to dismiss based on government misconduct.
   c. Object to sentencing enhancement based on a prior drug conviction, which was subject to direct appeal.
5. Attorney Miller significantly prejudiced the movant's ability to negotiate a plea agreement with the United States. (DE# 350 at ¶II).

III. Procedural and Factual History

The movant Ramon Lopez provided $50,000 in expense money to a confidential informant to hire a plane and crew to transport 300 kilograms of cocaine from La Guajira, Colombia to Miami, Florida.[2] The confidential informant later states that Lopez wanted the cocaine flown to his ranch. The 300 kilograms of cocaine were eventually brought into the United

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[1]Brady v, Maryland, 373 U.S. 83 (1963).

[2]The facts were gleaned from the Presentence Investigation Report. ("PSI")

States in an airplane flown by an undercover contract pilot for the United States Customs Service.

After the cocaine arrived in Miami, the pilot participated in a series of negotiations with Lopez concerning payment for the transportation of the cocaine. Eventually, codefendant Machado agreed to deliver $200,000 to the pilot for 200 kilograms of cocaine. Machado picked up the 200 kilograms of cocaine and left a 40 kilogram bale of cocaine with others. He was subsequently arrested, and he remaining 160 kilograms of cocaine were seized.

Ramon Lopez was indicted for conspiracy to possess with intent to distribute cocaine (Count 1) and possession with intent to distribute cocaine (Count 2) on April 24, 1991. (DE# 1). Lopez proceeded top jury trial, where he was found guilty as charged. (T/T at 1428).

The court sentenced Lopez to two concurrent life sentences, followed by five years of supervised release. An additional consecutive term of six months incarceration was imposed pursuant to 18 U.S.C. §3147. The sentences imposed as to counts 1 ans 2 were made concurrent to sentences previously imposed in Case Nos. 90-389-Cr-Davis and 92-395-Cr-Davis. The §3147 sentence is consecutive to the prior federal sentences. (DE# 265).

Arthur Joel Berger, appellate counsel, prosecuted a timely appeal, which raised the following claims:

1. The trial court erred when it admitted his prior conviction for the possession and conspiracy to possess five kilograms of cocaine.
2. The trial court erred in precluding him from introducing a certified copy of the Notice of Appeal of the judgment of conviction for a prior crime, which the government introduced as collateral crime evidence.

3. The trial court erred in admitting a statement of his to a confidential informant as co-conspirator hearsay.
4. The trial court erred in admitting hearsay testimony of a law enforcement officer pertaining to what a government informant told him about Lopez.
5. The trial court erred in its handling of a defense objection to a prejudicial factual assertion in the presentence report.

(DE# 339 Composite Ex. Appellant Brief at 1-2).

On April 24, 1995, the Court of Appeals affirmed. United States v. Lopez, 53 F.3d 1285 (11th Cir. 1995); cert denied. 516 U.S. 870 (1995).

IV. Statute of Limitations

The government claims that this motion should be dismissed as untimely pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA").

28 U.S.C. §2255 provides, in relevant part, as follows:

A 1-year time period of limitation shall apply to motion under this section. The limitation period shall run from the latest of- -

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered

through the exercise of due diligence.

The AEDPA took effect on April 24, 1996. The Eleventh Circuit Court of Appeals has adopted the now widely accepted one year equitable extension, so that a §2255 motion in a case which became final prior to April 24, 1996, must have been filed on or before April 23, 1997. Goodman v. United States, 151 F.3d 1335 (11th Cir. 1998).

On April 20, 1997, the movant dated and signed this motion under penalty of perjury. (DE# 318). The motion was file-stamped by the clerk's office on April 29, 1997. (Id).

The Eleventh Circuit Court of Appeals has not yet decided whether the "mailbox rule" applies to a pro se prisoner's filing of a petition or writ of habeas corpus or a motion to vacate. However, it is apparent that the majority of courts deem a pro se prisoner's pleading to be filed when delivered to prison officials, for purposes of AEDPA's one-year limitations period. Burns v. Morton, 134 F.3d 109 (3rd Cir. 1998)(applying "mailbox rule" to pro se §2254 petition); United States v. O'Kaine, 971 F.Supp. 1479 (S.D. Georgia 1997)(applying "mailbox rule" to pro se §2255 motion); Peterson v. Demske, 107 F.3d 92 (2nd Cir. 1997)(applying "mailbox rule" to pro se §2254 petition); In re Simms, 111 F.3d 45, (6th Cir. 1997)(applying "mailbox rule" to successive petitions and motions filed in the District Court after AEDPA went into effect).

In the absence of evidence to the contrary, it will be presumed that the movant delivered his motion for mailing on the day he dated and signed it under penalty or perjury, April 20, 1997. It is therefore timely pursuant tp the now generally recognized one year extension to the limitation period of the AEDPA.

V. Discussion

The government invokes a procedural bar as to claims one, two, and three.

There are three types of issues that a section 2255 motion cannot raise: (1) issues that were raised on direct appeal, absent

a showing of changed circumstances; (2) nonconstitutional issues that could have been but were not raised on direct appeal; and (3) constitutional issues that were not raised on direct appeal, unless the section 2255 movant demonstrates cause for the procedural default as well as actual prejudice from failure to appeal. Belford v. United States, 975 F.2d 310 (7th Cir. 1992), overruled on other grounds by Castillanos v. United States, 26 F.3d 717 (7th Cir. 1994).

A. Claim One

The government argues that claim one was already addressed in the petitioner's direct appeal. Review of Lopez' appellate brief reveals that claim one was raised as claim one and claim two of his direct appeal.

An issue resolved against a movant on direct appeal, cannot be relitigated in a §2255 motion. United States v. Frady, 455 U.S. 152, 166-168 (1982); Dermota v. United States, 895 F.2d 1324 (11th Cir. 1990), cert. denied, 498 U.S. 837 (1990); United States v. Johnson, 615 F.2d 1125, 1128 (5th Cir. 1980); United States v. Kalish, 780 F.2d 506, 508 (5th Cir. 1986).

B. Claims Two and Three

The government contends that claims two and three are procedurally barred because these claims should have been, but were not raised by Lopez in his direct appeal. In claim two, Lopez claims that his conviction was obtained by prosecutorial misconduct. In claim three, Lopez asserts that his conviction was obtained from the use of evidence obtained in violation of U.S. treaties and FAA regulations.

Lopez acknowledges that claims two and three were not raised on direct appeal. In an effort to overcome the procedural bar, Lopez asserts that he could not raise claim two on direct appeal, in part, because the evidence was not in the records for direct appeal. (DE# 318 ¶13). As for claim three, Lopez claims that he became aware of a basis for the claim, in part, through a freedom of Information ("FOIA") request. (Id).

Lopez' explanations fail to establish cause for the procedural default. Claims two and three address issues which could have been raised on direct appeal, but were not. Moreover, the movant does not state with any specificity what evidence became available to him at a later date. Consequently, claims two and three are procedurally barred.

C. Claim Four

In claim four, the movant asserts various ineffective assistance of counsel claims. Lopez was represented by different attorneys at the trial, sentencing, and appellate stages. He was originally represented by Scott A. Miller, Esquire. (DE# 43). Robert Alan Rosenblatt, esquire and Thomas M. Dawson, Esquire represented Lopez at trial (DE# 130); William M. Dawson, Esquire at sentencing (PSI); and Arthur Joel Berger, Esquire perfected Lopez' appeal. (DE# 339 Composite Exhibit, Appellate Brief).

A claim of ineffective assistance of counsel generally cannot not be raised on direct appeal where the claim has not been heard by the district court or a factual record developed. See United States v. Khoury, 901 F.2d 948, 969 (11th Cir. 1990) citing United States v. Edmondson, 818 F.2d 768, 769 (11th Cir. 1987)(per curiam); United States v. Rodriguez, 582 F.2d 1015, 1016 (5th Cir. 1978)(per curiam); United States v. Gray, 464 F.2d 632, 634 n.1 (8th Cir. 1972); United States v. Prince, 456 F.2d 1070, 1070-71 (5th Cir. 1972).

Nevertheless, if in a motion to vacate proceeding the movant was represented by different counsel on appeal and he offers no extrinsic evidence to support his claim of ineffective assistance, he will be procedurally barred by failure to pursue the issue on direct appeal. McCleese v., United States, 75 F.3d 1174, 1178 (7th Cir. 1996), and cases cited threat.

In an effort to overcome the procedural bar, the movant asserts ineffective assistance of counsel as to claim four. (DE# 318 ¶13).

A claim of ineffective assistance of counsel may constitute cause for failure to previously raise the issue. United States v.

Breckenridge, 93 F.3d 132 (4th Cir. 1996). Attorney error, however, does not constitute cause for a procedural default unless it rises to the level of ineffective assistance of counsel under the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984).

Subclaim a

In subclaim a of claim four, the movant asserts that trial counsel failed to investigate and challenge charges at the pretrial and trial stage.

In order for the movant to prevail in federal court on a claim of ineffective assistance of counsel, the movant must establish that 1) his counsel's representation fell below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Thus, Lopez must show that his counsel's performance was below constitutional standards, and that he suffered prejudice as a result. A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11th Cir. 1995).

Lopez claims that he was improperly charged for conspiracy to possess with intent t distribute cocaine and possession with intent to distribute cocaine. Defense counsel filed numerous pretrial motions on behalf of Lopez. (DE# 78-87). The movant makes no showing of what his attorney should have done differently. Aside from his blanket accusation, the movant fails to support his claim that he was improperly charged. The record clearly establishes that Lopez had already arranged for the purchase of the cocaine in Colombia and was on bond when he sought to hire a pilot to bring 300 kilograms of cocaine into the United States from Colombia. Lopez' concerns that police might be involved led him to ask Machado to continue negotiations between himself and the pilot.

The overwhelming evidence in this case clearly supports his convictions. The movant is not entitled to relief based on this claim of ineffective assistance of counsel.

Subclaim b

In subclaim b of claim four, the movant asserts that appellate counsel failed to appeal the denial of pretrial motions to dismiss based on governmental misconduct.

The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987). That is, as required by Strickland v. Washington, 466 U.S. 688 (1984), the movant must establish that 1) his counsel's representation fell below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different.

Review of the movant's pretrial motion to dismiss reveals claims that the government pre-targeted Lopez and then fabricated evidence against him. (DE# 201 at 1-2). In its response, the government noted that Lopez' claim that he was pre-targeted was speculative. It stated that "The Federal Bureau of Investigation received unsolicited information that defendant Lopez was looking for an aircraft to bring 300 kilograms of cocaine from Colombia. A check of law enforcement databases enabled the FBI to identify the case agent with the United States Custom Service and the prosecutor already handling the pending indictment against the defendant for a five-kilogram cocaine transaction..." (DE# 207 at 10). The trial court denied this motion. (DE# 217).

The movant does not provide factual support which would support his claim of governmental misconduct. Bare and conclusory allegations of ineffective assistant of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability, are insufficient to require a hearing or further consideration. See: Ferguson v. United States, 1699 F.2d 1071 (11th Cir. 1983); United States v.

Ammirato, 670 F.2d 552 (5th Cir. 1982); United States v. Sanderson, 595 F.2d 1021 (5th Cir. 1979); King v. United States, 565 F.2d 356 (5th Cir. 1978); Clayton v. Estelle, 541 F.2d 486 (5th Cir. 1976); Matthews v. United States, 533 F.2d 900 (5th Cir. 1976); Dugan v. United States, 521 F.2d 231 (5th Cir. 1975); Frank v. United States, 501 F.2d 173 (5th Cir. 1974). There was no basis for appeal as to this claim.

Subclaim c

In subclaim c of claim four, the movant asserts that counsel failed to object to a sentencing enhancement based on a prior drug conviction which was subject to direct appeal.

> The United States Sentencing Guidelines clearly states:
>
> The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea or nolo contendere, for conduct not part of the instant case.

U.S.S.G. §4A1.2 (1998).

There is no duty to raise issues on appeal which have little or no chance of success. Thus, appellate counsel is not required to raise meritless issues, Card v. Dugger, 911 F.2d 1494, 1520 (11th Cir. 1990), or issues which were not preserved and are procedurally barred on appeal, Bertolotti v. Dugger, 883 F.2d 1503, 1523 (11th Cir. 1989), cert. denied, 497 U.S. 1032 (1990); Jackson v. Dugger, 931 F.2d 712, 715 (11th Cir. 1991).

The guidelines do not include any exception for prior convictions which are subject to direct appeal, so that the movant is entitled to no relief based on this claim of ineffective assistance of counsel, either at sentencing or on appeal.

D. Claim Five

In claim five, the movant asserts that his original trial attorney, A. Scott Miller, Esquire, significantly prejudiced his ability to negotiate a plea agreement with the United States. Lopez contends that Miller did not advise him that Miller was the target of a federal investigation during the time he represented him. Lopez also contends that Miller failed to

negotiate a package plea for all his cases and did not provide a copy of the proposed plea to his substitute counsel, Thomas M. Dawson, Esquire, and Robert Alan Rosenblatt, Esquire. The record belies this claim.

Scott Miller originally represented Lopez. (DE# 43). On March 10, 1991, Miller sought substitution of counsel. (DE# 129). That same day, attorneys Dawson and Rosenblatt entered appearances on behalf of Lopez. (DE# 130). Prior to his withdrawal as counsel, Miller sought a plea agreement in this case. (DE# 205 Attachment). In a letter dated June 18, 1991, the prosecutor outlined the conditions fr an agreement. (Id).

In a letter dated June 23, 1992, defense counsel Dawson also attempted to negotiate a plea agreement. (DE# 351 Composite Exhibit June 23, 1992 letter). The letter discusses the government's "negative attitude" toward a plea agreement. Lopez asserts that his negative attitude was caused by Miller. N a response letter to the government dated June 25, 1992, the government expressly informed attorney Dawson that it "is not interested in and will not agree to any cooperation plea agreement" with Lopez. (DE# 351 Composite Exhibit June 25, 1993 letter).

Lopez proceeded to trial on July 8, 1993, over two years after substitute counsel entered the case. The record demosntrates that attorneys Miller and Dawson both sought a plea agreement in Lopez' cases. However, the government is not required to extend a plea offer in any case. The movant fails to demonstrate how attorney Miller prejudiced his ability to negotiate a plea agreement with the government. Lopez has not met the requirements of Strickland v. Washington, supra, in connection with his claims of ineffective assistance of counsel.

VI. Conclusion

It is therefore recommended that this motion to vacate be denied.

Objections to this report may be filed with the District

Judge within ten days of receipt of a copy of the report.
Dated: December 18, 1998.

Charlene H. Sorrentino
United States Magistrate Judge

cc: Rhonda A. Anderson, Esq.
2420 Coral Way
Miami, FL 33145

Karen E. Rochlin, AUSA
99 N.E. 4th Street
Miami, FL 33132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARO-BENAGES
(91-0317-CR-UNGARO-BENAGES)

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

OMNIBUS ORDER

THIS CAUSE is before the Court upon Movant's pro se Motion to Vacate Convictions and Sentences pursuant to 28 U.S.C. §2255 ("§2255 Motion"), filed April 29, 1987; Movant's Motion for Leave to Invoke Discovery and/or Expand Records ("Discovery Motion") (DE-345), filed July 20, 1998; and Movant's Motion for reconsideration and Stay of Action Pending Ruling on Disclosure of Discovery in related Matter ("Motion for Reconsideration") (DE-356), filed January 21, 1999.

THE MATTER was referred to the Honorable Charlene Sorrentino, United States Magistrate Judge. A Report of Magistrate Judge ("Report"), dated December 18, 1998 has been filed, recommending that Movant's Motion to Vacate be denied on all counts. In arriving at this recommendation, Magistrate Sorrentino considered the parties' allegations and submissions regarding Movant's Discovery Motion, however rejected Movant's arguments therein as meritless in light of Respondent's submissions. *See* DE-346, 351. The Magistrate, however, did not specifically rule on Movant's Discovery Motion. Movant, now represented by counsel, objects to the

Report. Rather than citing specific objections, he has filed the aforementioned Motion for Reconsideration and Stay of Action Pending Ruling on Disclosure of Discovery in Related Matter.[1] Respondent did not respond to Movant's Motion for Reconsideration. Movant's Motion for Leave to Invoke Discovery is fully briefed and ripe for disposition.

THE COURT has made a de novo review of the Motions, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Magistrate Sorrentino's Report of Magistrate Judge is RATIFIED, AFFIRMED, AND ADOPTED insofar as it recommends denial of Claims I, II, III, and IV contained in Movant's §2255 Motion. Claims I, II, III, and IV of Movant's Motion to Vacate Convictions and Sentences pursuant to 28 U.S.C. §2255 are DENIED. It is further

ORDERED AND ADJUDGED that Movant's Motion for Leave to Invoke Discovery and/or Expand Records (DE-345) is DENIED. It is further

ORDERED AND ADJUDGED that Movant's Motion for Reconsideration and Stay of Action Pending Ruling on Disclosure of Discovery in related Matter (DE-356) is GRANTED insofar as it pertains to Claim V of Movant's §2255 Motion. As it pertains to Claim V, this cause is remanded for reconsideration in light of Movant's allegation that attorney Miller never informed him of an available plea offer or pursued plea negotiations on his behalf. Insofar as Movant's Motion pertains to any other Claim, Movant's

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[1]Movant's "related matter" is a similar §2255 Motion filed by Movant in another case currently under consideration before Chief Judge Davis and Magistrate Garber. *See* 97-1875-CIV-DAVIS and 90-0389-CR-DAVIS. In that matter, Movant has made allegations similar to those in the present matter's Claim V.

Motion for Reconsideration is DENIED. Upon remand, the Magistrate should consider whether there are facts sufficient to support this allegation and, if so, whether Movant has met his burden under the first prong of *Strickland v Washington*, 466 U.S. 688 (1984). If so, in accordance with the standards set forth in *Strickland*, the magistrate should consider whether there is a reasonable probability that the result of the proceedings would have been different. *See id.* Thereafter, the Magistrate should make a second Report and Recommendation as to the appropriate disposition of this Claim. Accordingly, this cause is remanded to the Magistrate Sorrentino for further consideration in light of the above issues.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of February, 1999.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Rhonda Anderson, Esq.
Karen Rochlin, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)
MAGISTRATE JUDGE SORRENTINO

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE

Ramon Lopez, a federal prisoner currently confined at U.S.P. Lewisburg in Lewisburg, Pennsylvania, filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence imposed pursuant to a guilty verdict in Case No. 91-0317-Cr-Ungaro-Benages. Lopez is now represented by Rhonda A. Anderson, Esquire. (DE# 344).

A report recommending the denial of this motion to vacate was entered on December 18, 1998. (DE# 342). On February 25, 1999, the Honorable Ursula Ungaro-Benages, District Judge, entered an order adopting the recommendations as to Claims I., II, III, and IV; and remanding for reconsideration of Claim V. (DE# 358).

Lopez asserts in Claim V that his trial counsel, A. Scott Miller, Esquire, failed to advise him of an available plea offer and failed to pursue plea negotiations on his behalf. He raised the same claim in a motion to vacate in Case No. 97-1875-Civ-Ungaro-Benages, challenging Case No. 90-389-Cr-Davis. Miller represented Lopez in both cases, and both cases would

have been governed by the same plea bargain agreement. (DE# 369; Ex. K and DE# 374).

The record reveals that Miller sought a plea agreement in this case, and the government outlined the conditions for a plea agreement.. (DE# 205 Attachment and DE# 374; Ex. K). However, the government developed a "negative attitude" toward an agreement. (DE# 351; Composite Exhibit June 23, 1992 letter). Lopez asserts that this negative attitude was caused by Miller. The government stated in a letter that it "[was] not interested and [would] not agree to any cooperation plea agreement" with Lopez. (DE# 351 Composite Exhibit June 25, 1993 letter). The government is not required to extend a plea offer in any case.

Moreover, when Lopez raised the same claim in the motion to vacate in Case No. 97-1875-Civ-Ungaro-Benages, challenging Case No. 90-389-Cr-Davis, Magistrate Judge Barry L. Garber recommended that the motion to vacate be denied. The Honorable Edward B. Davis, Chief Judge, entered and order adopting the report in part, and remanding for consideration of two claims, 1) that Scott Miller, Esquire, labored under an actual conflict of interest which resulted in his persuading Lopez to proceed to trial instead of cooperating with the government, and 2) that Miller rendered ineffective assistance by failing to advise Lopez of a plea offer. (Case No. 90-389-Cr-Davis; DE# 376).

Magistrate Judge Garber conducted evidentiary hearings on June 10, 1999 and November 16, 1999, and entered a second supplemental report and recommendation thereafter. (Case NO. 97-1422-Civ-Ungaro-Benages; DE# 374 and Case No. 90-389-Cr-Davis; DE# 408). Thereafter, he made the following findings (Case No. 90-389-Cr-Davis; DE# 408):

> It is clear to the Court that petitioner was aware that a plea agreement had been proffered by the government. An examination of the transcript pf the sentencing that took place on January 9, 1992 is revealing in that regard. Mr.

> Miller advised the sentencing Court that "there is no question in this case that Mr. Lopez, myself, AUSA Rochlin, and the agents have discussed plea negotiations." [Transcript of sentencing, at page 10.] Further, and most telling, is Mr. Miller's statement: "The bottom line is that mr. Lopez couldn't come to terms with the Government's offer. That's the bottom line. So he exercised his right to go to trial." [Transcript of sentencing, at page 10.] Both Miller and petitioner acknowledge that the choice of cooperation or proceeding to trial belonged solely to petitioner.
>
> If the petitioner was not aware of any offer that had been submitted by the government, the most basic logic dictates that he would have made some remark when reference was made to the "government's offer," and reference to "plea negotiations" made by his attorney at the sentencing. In fact, petitioner, in his remarks to the Court, clearly stated that "[I] have tried every way possible to reach an agreement, just like my attorney said, with the Government." [Transcript of sentencing, at page 15.] It thus appears to the undersigned that petitioner was advised of the existence of a plea offer by his attorney, which he could not and did not accept. The Court finds attorney Miller's testimony tat he advised the petitioner of the plea agreement and its contents to be credible and supported by the events that occurred at the sentencing regarding same. (Case No. 90-389-Cr-Davis; DE# 408 at 2-3).

When considering if there was prejudice, Magistrate Judge Garber stated:

At the hearing conducted on June 10, 1999 the Court heard the testimony of AUSA Karen Rochlin who prosecuted this cause at trial. Ms. Rochlin testified *inter alia* that "...I had no interest in his cooperation. Partly because it seemed to me, if he couldn't even get through or commence a debriefing, I was concerned how he would hold up on a witness stand under cross examination. Also, at that point, I was beginning to receive information in detail, first from the North Miami Beach Police Department, as time went on, about other allegations concerning Mr. Lopez. So with that information I became convinced that it would be inappropriate to accept cooperation from Mr. Lopez." [Transcript of sentencing, at pages 52-53].

It is not clear to the Court that the government had no interest in seeking or receiving cooperation from the petitioner. Ms. Rchlin recounts that "I was contacted by Mr. Miller. And he told me that he wanted me to send him a draft plea agreement – a draft cooperation plea agreement for Mr. Lopez. And in that phone conversation I told him that I was no longer interested in doing that. He asked me to send him the document anyway. And we argued about it." ... "It was a strange conversation. I was trying to tell Mr. Miller that I was not interested in his client's cooperation any more, and there was simply no way I was going to go forward with a cooperation plea agreement on behalf of Ramon Lopez. Mr. Miller kept insisting that I sent [sic] him the document any way." [Transcript of sentencing, at page 53].

> Although AUSA Rochlin inexplicably condescended and sent a plea agreement to mr. Miller, she testified that "he should have no expectation what so ever that anything would follow from it. And then I was a little - I guess I was some what concerned about it because I told him that I never wanted to hear about the document or see it again". It is thus apparent to the Court that the government would not and did not expect to enter into a plea agreement with the petitioner and such position was related to petitioner's attorney by AUSA Rochlin. Accordingly, given the government's unwillingness to accept a negotiated plea from the petitioner based upon his cooperation, he was not prejudiced. Petitioner has also failed to present any evidence that he would have accepted a plea offer. United States v. Barber, 808 F.Supp. 361, 378 (D.N.J. 1992).
>
> The record in this cause does not reveal petitioner's willingness to provide cooperation in his cases or as to other persons involved in narcotics violations. Indeed, efforts to proceed in such direction at a debriefing resulted in emotional outbursts from the petitioner. [Transcript of November 16, 1999 hearing at pages 51-53, 60-61, and 63-64; also, transcript of March 12, 1998 hearing at pages 35-36].

Both Case No. 90-389-Cr-Davis and Case No. 91-317-Cr-Ungaro-Benages involved the same trial attorney, A. Scott Miller, Esquire. The claims are the same in each case. Magistrate Judge Garber conducted evidentiary hearings to explore the merits of the allegation, and determined that there was no merit.

It is therefore recommended that Claim V of this motion

to vacate sentence be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: June 21, 2000.

Charlene H. Sorrentino
United States Magistrate Judge

cc: Rhonda A. Anderson, Esq.
2420 Coral Way
Miami, FL 33145

Karen E. Rochlin, AUSA
99 N.E. 4th Street
Miami, FL 33132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER AFFIRMING MAGISTRATE'S SUPPLEMENTAL REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon Movant's Motion to Vacate Convictions and Sentences pursuant to 28 U.S.C. §2255, filed April 29, 1987. The Honorable Charlene Sorrentino, United States Magistrate Judge issued a Report and recommendation denying all five counts of Movant's Motion on December 18, 1998. In an Order dated February 25, 1999, this Court remanded Count V to Magistrate Sorrentino to consider Movant's allegations that attorney Miller never informed him of an available plea offer or pursued plea negotiations on his behalf. (DE# 358). Magistrate Sorrentino, issued a Supplemental Report and Recommendation ("Report") dated June 21, 2000, recommending that Count V of Movant's Motion to vacate be denied. Movant filed objections and the Government responded.

THE COURT has conducted a *de novo* review of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Magistrate

Sorrentino's Report is RATIFIED, AFFIRMED, AND APPROVED. Movant';s Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of September, 2000.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Magistrate Judge Sorrentino
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER

THIS CAUSE is before the Court upon Movant's Motion for Leave to File Motion for Reconsideration of Order Adopting Report and recommendation of Magistrate Judge Denying Motion to Vacate under 28 U.S.C. §2255, filed October 30, 2000.

THE COURT has upon considered the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that said Motion is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3 day of November, 2000.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record